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88-683

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARLTON JAMES LEWIS, *Petitioner,*

v.

SHAWN KATHLEEN LEWIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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October 21, 1988

QUESTIONS PRESENTED

1. Whether the Michigan Court of Appeals erred in holding that, under *Roe v. Wade* and its progeny, a state court may not enjoin an abortion where the woman's physician has determined that the abortion is not medically necessary for her well-being and where competing interests have been asserted?

2. Whether *Roe v. Wade* should be reconsidered, because this Court is in a better position to consider the abortion dilemma today than in 1973, and because the balancing of competing interests required herein is more properly and effectively performed by the legislatures of the states?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Carlton James Lewis, father of Unborn Child Lewis, the respondent Shawn Kathleen Lewis, mother of Unborn Child Lewis, and Gene Myers, guardian ad litem for Unborn Child Lewis. Gene Myers has already filed with this Court a Petition for a Writ of Certiorari to the Michigan Court of Appeals in the present case, docket number 88-555.

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Akron Center for Reproductive Health v. Slaby, No. 86-3664, slip op. (6th Cir. Aug. 12, 1988) 22

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1976) 20-22

Bellotti v. Baird (I), 428 U.S. 132 (1976) 22

Bellotti v. Baird (II), 443 U.S. 622 (1979) 22

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Conn v. Conn, No. 88-347, (U.S. filed Aug. 23, 1988) ... 10

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Griswold v. Connecticut, 381 U.S. 479 (1964) 13

Harris v. McRae, 448 U.S. 297 (1980) 8

H. L. v. Matheson, 450 U.S. 398 (1981) 22

Hodgson v. Minnesota, No. 86-5423, slip op. (8th Cir. Aug. 8, 1988) 22

Holt v. Shelton, 341 F. Supp 821 (M.D. Tenn, 1972) 17

Honig v. Doe, 108 S.Ct. 592 (1988) 3-4

In re Baby M, 537 A.2d 1227 (N.J. 1988) 12

Labine v. Vincent, 401 U.S. 532 (1971) 18

Maher v. Roe, 432 U.S. 464 (1977) 8, 11

Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 4766 (1983) 22

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)..... 2, 7-9, 13, 22

Prince v. Massachusetts, 321 U.S. 158 (1943)..... 13

Reed v. Reed, 404 U.S. 71 (1971)..... 18

Rivera v. Minnich, 107 S.Ct. 3001 (1987) 12

Roe v. Wade, 410 U.S. 113 (1973)..... *passim*

Santosky v. Kramer, 445 U.S. 745 (1982)..... 12-13

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Stanley v. Illinois, 405 U.S. 645 (1972)..... 8, 12

Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986)..... 14-15, 22

Statutes and Constitutions:

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Other Authorities:

Arbagi, "*Roe* and the Hippocratic Oath," in *Abortion and the Constitution: Reversing* Roe v. Wade *Through the Courts* (Horan, Grant & Cunningham eds. 1987)... 17

R. Benson, *Current Obstetric & Gynecological Diagnosis & Treatment* (5th ed. 1984)..... 19

Black's Law Dictionary (5th ed. 1979)..... 12

W. Blackstone, *Commentaries on the Laws of England* (1783 & photo. reprint 1978)..... 16

Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125 (1981) 17

Bracton, *On the Laws and Customs of England* (S. Thorne trans. 1968) 16

H. Clark, *Law of Domestic Relations* (1968)..... 18

Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," in *Abortion and the Constitution: Reversing* Roe v. Wade *Through the Courts* (Horan, Grant & Cunningham eds. 1987)... 17

A. Cox, *The Role of the Supreme Court in America* (1976) 20

Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution: Reversing* Roe v. Wade *Through the Courts* (Horan, Grant & Cunningham eds. 1987)... 17

Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 17

Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Calif. L. Rev. 1250 (1975)..... 16-17

Dorland's Illustrated Medical Dictionary (24th ed. 1965) 12

Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973)..... 23

F. Frankfurter, *The Public and Its Government* (1930) . 23

Horan & Balch, "*Roe v. Wade:* No Justification in History, Law, or Logic," in *Abortion and the Constitution: Reversing* Roe v. Wade *Through the Courts* (Horan, Grant & Cunningham eds. 1987) 17

H. Krause, *Illegitimacy: Law and Social Policy* (1971) . 18

Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev. 730 (1968) 16

Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) 16

J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) 16

Note, *The Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 337 (1962) 18

R. Perkins, *Cases and Materials on Criminal Law and Procedure* (1969) 16

Proposed Constitutional Amendments on Abortion: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 5-30 (1976) (statement of Professor Joseph P. Witherspoon) 16

Statement of J. Stoker, O.D. 6, 20a

Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. Fam. L. 231 (1971) 18

Turton, *Unequal Protection of the Illegitimate Child*, 13 S. Tex. L.J. 126 (1971) 18

Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U.L. Rev. 231 15-20

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Petitioner Carlton James Lewis, father of Unborn Child Lewis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals, entered in *Lewis v. Lewis and Myers* on September 15, 1988.

OPINIONS BELOW

The Order of the Michigan Supreme Court (not reported), refusing to review the opinion of the Michigan Court of Appeals, is reprinted in the appendix hereto, p. 1a, *infra*.

The Order of the Michigan Court of Appeals (not reported) is reprinted in the appendix hereto, p. 3a, *infra*.

The Stipulated Findings of Fact and Conclusions of Law of the Genessee County Circuit Court is reprinted in the appendix hereto, p. 7a, *infra*.

JURISDICTION

The Jurisdiction of this Court to review the judgment of the Michigan Court of Appeals is invoked under 28 U.S.C. § 1257(3) based on the assertion by the respondent of rights under the Constitution of the United States.

The petitioner Carlton James Lewis, father of Unborn Child Lewis, obtained a preliminary injunction in the Genesee County [Mich.] Circuit Court, on September 6, 1988, barring his wife from obtaining an abortion. Appendix at 7a. He argued in the trial court that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), did not preclude a court from considering the rights and interests of both a mother and a father in determining whether she should be enjoined from obtaining an abortion. The respondent argued that *Roe* gave her an absolute right to abortion and that *Danforth* forbade the court from considering the rights and interests of her husband and enjoining her abortion.

On the respondent's appeal, the Michigan Court of Appeals, on September 15, 1988, ordered the preliminary injunction dissolved, holding that, under *Roe* and *Danforth*, the act of the trial court in enjoining the abortion was unconstitutional. Appendix at 3a. On the petitioner's appeal, the Michigan Supreme Court, on September 22, 1988, declined to accept the case for review. Appendix at 1a. No rehearing was sought.

Thus, there is a decision from the highest court of the state of Michigan. Moreover, despite the fact that the injunction was styled a preliminary one, the order of the Michigan Court of Appeals dissolving the preliminary injunction makes the matter final for purposes of appeal. There can be no further hearings. As the precedents now stand, there cannot even be further cases on this issue, at least in Michigan.[1]

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[1] Likewise, the assertion of paternal interests in the abortion context may no longer be asserted in Indiana, due to a contrary precedent, now before this Court on a Petition for a Writ of Certiorari to the Indiana Supreme Court, styled *Conn v. Conn*, docket number 88-347.

While no official notice has been given, the Father believes that the Mother has already aborted their unborn child. However, this case is within the exception to the mootness doctrine for matters "capable of repetition, yet evading review," as that doctrine is employed in abortion cases. *Cf. Roe*, 410 U.S. at 125; *Doe v. Bolton*, 410 U.S. 179, 187 (1973). In the 1988 case of *Honig v. Doe*, 108 S.Ct. 592 (1988), Justice Scalia, in a concurring opinion joined by Justice O'Connor, observed that the requirement that the matter be capable of repetition between the same parties is relaxed in cases involving election and abortion. *Id.* at 610. In abortion jurisprudence, it is sufficient if the matter is capable of recurring between the complaining party and the public at large. *Id.* at 610-11.

This Court, in *Honig*, declared that it "ha[d] jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation" complained of in the case. *Id.* at 601. In the present case, as in *Honig*, "such a possibility does in fact exist and . . . the case therefore remains justiciable." *Id.*

In *Honig*, this Court found that, although a young man with a disability had dropped out of school, as long as "he remain[ed] a resident of California" there was a "reasonable likelihood" he might return and again be deprived of the sort of educational care required by law. *Id.* In the present case, as long as the Father remains a resident of Michigan, both he and fathers in the general public will continue to be deprived, by the erroneous decision of the state appellate court, from asserting paternal rights and interests against abortions for which there is no fundamental right. These fathers will continue to be subject to the abortion on demand of their unborn children, even in cases where the only medical judgment is that the abortion is unnecessary for the well-being of the mother. There is a reasonable likelihood that, as a young man of proven fecundity, he will again become a father. As such, given the high annual rate of abortions, he may well face again this precise situation. Thus, this matter is reasonably likely to recur between the Father and the state. Moreover, it is certain that other fathers will likewise be deprived of the right to assert

their rights and interests by the action of the Michigan courts in this matter. The annual rate of a million and a half abortions per year, a substantial number of which occur in Michigan, guarantees recurrence.

As to the second part of the test — "yet evading review" — if "[p]regnancy provides a classic justification for a conclusion of nonmootness," *Roe*, 410 U.S. at 125, because of its "266-day human gestation period," *id.*, then abortion, usually performed in the early weeks of pregnancy, does so even more. "If that termination makes a case moot, pregnancy [and abortion] litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid." *Id.*

Finally, every effort was made to bring this case before this Court on the merits before it became subject to mootness challenges.[2] These efforts, including an application for a stay pending certiorari review and a motion for expedited consideration, which were filed and considered while the injunction, extended by the Michigan Supreme Court, was yet in effect, proved unsuccessful. As the precedents now stand, there can be no controversies more live than this one in which to consider the issues herein. Otherwise, "appellate review would be effectively denied," a result sought to be avoided in *Roe*. *Id.*

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[2] As in *Honig*, both the petitioner and the respondent believe that this case is yet justiciable. *Honig*, 108 S.Ct. at 601 n. 5. In her opposition to this Court's grant of a stay pending expedited consideration of this case, the Mother argued:

> In any event, Carlton is clearly wrong in contending, in support of finality, that if Shawn had an abortion the case would be moot. At this Court has held, pregnancy is a 'classic' example of an issue that is 'capable of repetition yet evading review' and thus an exception to the normal rules of mootness.

Response to Petitioner's Application for a "Stay" Pending Petition for Certiorari to the Michigan Supreme Court at 3 n. 2 (citations omitted).

CONSTITUTIONAL PROVISION INVOLVED

> All persons born or naturalized in the United States . . . are citizens of the United States . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On January 20, 1988, the respondent (hereinafter the Mother) filed for divorce from the petitioner (hereinafter the Father). During a period of reconciliation, from late May to mid-July, 1988, the parties engaged in multiple acts of coitus without contraception, although they had employed contraception at previous times. Defendant's Response to Plaintiff's Brief in Support of Motion to Dissolve Ex-parte Preliminary Injunction at vi. Around August 8, 1988, the Mother informed the Father that she was seven or eight weeks pregnant and intended to have an abortion. She does not dispute that he is the father.

On August 9, 1988, on the Father's motion, the Genessee County Circuit Court issued a Temporary Restraining Order, ex parte, prohibiting the abortion. Around August 17, counsel for the Mother appeared and urged that this abortion was necessary for the health of the Mother. The trial court declared it would dissolve the injunction on August 19, 1988, if this assertion could be documented. On August 19, the Mother's counsel admitted to the trial court that the woman's personal physician had, in fact, indicated that there were no health reasons for the abortion. Appendix at 8a, 20a. The trial court offered the Mother's counsel a hearing on whether the injunction ought to be dissolved, but the Mother's counsel agreed that a hearing on September 6, 1988, "would be in plenty of time in terms of her client's physical condition to have a decision of the

Court on the issue of dissolving the injunction." Appendix at 8a.

On September 6, 1988, the Circuit Court conducted a hearing and found that the abortion sought was not medically necessary for the well-being of the Mother. *Id.* Based upon a written statement, entered into evidence, from the Mother's attending physician, the court found that the abortion decision "was specifically a social decision as opposed to a medical decision to terminate the pregnancy." Appendix at 20a. *Cf.* Statement of J. Stoker, O.D., at 20a.

On September 6, 1988, the Circuit Court issued a preliminary injunction prohibiting the Mother from having an abortion and certified the Order as a "Final Order For Purposes of Appeal There Being No Just Cause For Delay."[3] The Court also appointed attorney Gene Myers as Guardian Ad Litem for the Unborn Child during the pendency of this matter.

On September 15, 1988, the Michigan Court of Appeals ordered the the trial court's injunction dissolved, but issued a stay of its order pending appeal to the Michigan Supreme Court.

On September 15, 1988, the Michigan Supreme Court granted appellants' motion for immediate consideration of their application for leave to appeal and ordered any further briefing to be submitted by 5:00 p.m. on September 20, 1988.

On September 22, 1988, the Michigan Supreme Court refused to review the Court of Appeals decision but extended the stay of the appellate court's order until Monday, September 26, 1988 at 5:00 p.m.

On Friday, September 23, 1988, an application for a stay pending certiorari review and a motion for expedited appeal

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[3] The circuit court distinguished *Roe* from the present case on factors not argued herein. Rather, the Father defends the trial court's decision on the basis of the finding of no medical necessity for the abortion, as required by *Roe v. Wade*.

were submitted to Justice Scalia, circuit justice for the sixth circuit, and were by him referred to the whole Court on Monday, September 26, 1988. The application and motion were denied that day.

The federal constitutional issues, under the Fourteenth Amendment, have been raised in this case from its inception. Before the trial court, the Mother asserted her constitutional right to an abortion, as noted *supra*. The scope of the abortion privacy right was likewise raised to the Michigan Court of Appeals. In his brief to that court, the Father argued that *Roe* did not give a woman an "absolute right to an abortion," thereby rejecting the abortion on demand sought by the Mother herein. Brief of Appeal for Defendant-Appellee at 7. The Mother argued to the court of appeals that the refusal of the trial court to dissolve its injunction "totally contradicts the U.S. Supreme Court's explicit rulings in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*." Plaintiff's Brief in Support of Application for Appeal and for Immediate Consideration at 6. All parties, the Father, the Mother, and the Guardian Ad Litem have continued to raise the issue of the scope of *Roe* and its progeny throughout the proceedings, including earlier applications to this Court.

REASONS FOR GRANTING THE WRIT

This Petition should be granted because the Michigan Court of Appeals erred grievously in ordering the injunction prohibiting the abortion herein dissolved, based on its incorrect interpretation of *Roe v. Wade* and its progeny. By its error, the court of appeals unconstitutionally deprived the Father of his unborn child by sanctioning abortion on demand, which has been rejected by this Court. The only evidence adduced in this case is that the woman's attending physician made a medical judgment that the abortion sought in this case was not medically necessary for her well-being. The decision of the appellate court violates the clear holding of *Roe* that abortion is primarily a medical decision and that there must be a medical judgment that the abortion is medically necessary for the well-being of the Mother. The argument herein may be briefly summarized.

First, *Roe* held that an abortion decision is "inherently, and primarily, a medical decision, and basic responsibility for it must rest with the [woman's] physician." *Roe*, 410 U.S. at 166. *Roe* also declared that the right to abortion is not "absolute," *id.* at 154, but that it "must be considered against important state interests in regulation." *Id.* *Roe* did not recognize a fundamental right to abortion in situations where there was mere demand or where the woman's physician has determined that the abortion is not medically necessary for her well-being, as in the case at bar. Therefore, the Mother's interest in an abortion is not a fundamental right. The state's action in enjoining her abortion need only be rationally related to a permissible state purpose.

Second, the state has a constitutionally permissible purpose in protecting legitimate interests of the Father, the state, and the unborn child. The Father has interests in his children, recognized as rising to the level of constitutional rights, which include the care, custody, control, and companionship of his child, which interests logically extend to unborn children. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). The state has an interest in preferring childbirth over abortion. *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977). The state also has an interest in protecting unborn human life which was recognized in *Roe* itself. *Roe*, 410 U.S. at 159, 163. Neither *Roe* nor *Danforth* precluded the consideration of paternal rights and interests. This, of course, is particularly true where the right of the mother is not fundamental by reason of a lack of medical necessity. In *Roe*, consideration of a father's rights was expressly postponed, because such rights were not raised. *Roe*, 410 at 165 n.67. *Danforth* dealt with a statute requiring spousal consent, whether or not the spouse was the father, which could be withheld for any or no reason, or by mere inability to be found, and rejected a unilateral approach to the abortion decision. *Danforth*, 428 U.S. at 69, 71. By contrast, the Father herein seeks a judicial consideration of competing rights and interests, based on the facts of each case. Such

consideration is rationally related to a permissible state purpose and, therefore, the action of the trial court in enjoining this abortion was not constitutionally infirm. It would also be constitutionally sound if done to protect the other two interests asserted.

Third, if, however, the decisions of this Court have reached the point where abortion on demand, even where the medical evidence indicates no medical reason for the abortion, is now considered constitutionally protected, and no competing interests may be weighed (such as those asserted on behalf of the Father, the state, and the unborn child), then *Roe* should be reconsidered for its pernicious effects. Moreover, as it is clear that the balancing of interests required in a case such as this is historically and practically more properly and effectively done by the legislature, *Roe* should also be reconsidered for this reason.

I. THE MICHIGAN COURT OF APPEALS ERRED IN ITS ANALYSIS OF *ROE v. WADE* AND *PLANNED PARENTHOOD OF CENTRAL MISSOURI v. DANFORTH*.

A. ROE DID NOT RECOGNIZE THE CONSTITUTIONAL PROTECTION AFFORDED FUNDAMENTAL RIGHTS FOR ABORTIONS NOT MEDICALLY NECESSARY FOR THE WELL-BEING OF THE MOTHER.

The Michigan Court of Appeals declared the injunction, barring the abortion herein, an interference with plaintiffs constitutional rights, as set forth in *Roe* and *Danforth*.[4] Appendix at 3a. In *Roe*, *Doe v. Bolton*, 410 U.S. 179 (1973), and other cases, this Court held that the abortion right is not absolute, that it is not equivalent to abortion on demand, that it "must be considered against important state interests," and that it must

[4] Although the appellate court relied on *Danforth* as well as *Roe*, *Danforth* did not address the point of medical necessity. As seen *infra*, *Danforth* did not preclude judicial consideration of the rights and interests of both the mother and the father in the abortion context.

be properly the subject of a medical decision determining it to be necessary for the well-being of the mother. *Roe*, 410 U.S. at 154, 166. The analysis in the Petition for a Writ of Certiorari filed in this case by the Guardian Ad Litem herein is adequate on this point. *See* Petition of Guardian Ad Litem at 8-13. That exposition need not be repeated.

In sum, *Roe* and its progeny only recognized a fundamental right to an abortion where the abortion was medically necessary for the well-being of the mother. This resulted from the Court's consideration of the balance of rights between a maternal abortion interest and the competing interests of the state and the unborn child. Any interest asserted by the Mother herein in having an abortion not conforming to this paradigm must be considered a nonfundamental interest, lowering the level of scrutiny on judicial review. As the abortion sought herein is not medically indicated, the analysis must be that applying to nonfundamental rights.

Although *Danforth* was relied upon by the appellate court, it did not address this issue, as it was not before it. Thus, any perceived restriction of *Danforth* on the assertion of spousal or paternal interests in the abortion context is wholly inapplicable, because any such restriction would apply only where the woman has a fundamental right to her abortion. Here, the Mother has no fundamental right to abortion, for she has failed to adduce evidence showing her case to be within the protection of *Roe*, i.e., there are no medical indications for her abortion. Thus, this case is of a different nature than that of *Conn v. Conn*, now before this Court on a Petition for a Writ of Certiorari, docket number 88-347, in which it is argued that, despite the woman's fundamental right to abortion, competing interests of her husband, the father of her child, must be considered. In *Conn*, a compelling interest needs to be shown, due to the presence of a fundamental right.[5] In the present

[5] This is true only of the substantive due process analysis. The petitioner in *Conn* also argues an alternative, independent theory based on the balancing of competing rights. *See Conn v. Conn*, docket number 88-347, Petition for a Writ of Certiorari at 27-28.

case, the action of the state need only be rationally related to a constitutionally permissible purpose, because the abortion sought is not within the protection afforded fundamental rights.

B. ABSENT CONSTITUTIONAL PROHIBITION, AN ABORTION MAY BE PROSCRIBED BY A STATE COURT WHERE WEIGHTY, COMPETING INTERESTS ARE ASSERTED.

As the abortion "right" asserted by the Mother herein is necessarily a nonfundamental interest, the proper analysis asks whether the action of the state court in enjoining the abortion was rationally related to a legitimate state purpose. *Maher v. Roe*, 432 U.S. 464, 478 (1977). Further discussion of the appropriate test is set forth in the petition of the Guardian Ad Litem and need not be repeated here. *See* Petition of Guardian Ad Litem at 16-17. However, in the Guardian's petition, only the interests relating to the unborn child were discussed — the interests of the state in protecting unborn human life and in preferring childbirth over abortion. While judicial protection of either of these would adequately support the trial court's action, the Father herein sets forth his own interests in his unborn child as an independent basis for supporting the action of the trial court.

1. THE FATHER HAS PROFOUND FUNDAMENTAL RIGHTS AND INTERESTS IN HIS UNBORN CHILD.

Fathers have profound fundamental rights and interests in their children rooted in the biological relationship arising from their status as procreator of the child and, in this case, in their participation in the societally sanctioned institution of marriage. These rights have been recognized from antiquity. Logically, they extend to the unborn child as well as the born child, because the father has no less interest in the procreation of this particular child before birth than after it is born, he is no less a biological father before birth than after, and he is no less a

husband before birth than after. Analytically, there are three distinct interests.

First, the Father has a right and interest in procreation, which is especially significant where it has become particularized in this specific, Unborn Child. Procreation is "the entire process of bringing a new individual into the world." *Dorland's Illustrated Medical Dictionary* (24th ed. 1965). Procreation is not something that happens at the moment of birth. The interest in procreation was recognized as rising to the level of a fundamental constitutional right by this Court. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). While no man has a right to force a woman to procreate with him, where an unborn child has already been procreated by consensual sexual intercourse (in this case during repeated coitus without use of contraception), the father has a distinct constitutional interest in protecting the unborn child which he has procreated.

Second, the Father has a right and interest in his unborn child, which is a natural right inherent in his biological relationship to the child. The right of procreation does not, in and of itself, give a father the right to the custody of the child at birth, as was noted by the court in the recent case of *In re Baby M*, 537 A.2d 1227, 1253 (N.J. 1988). They are distinct rights. *Id.* The right of a natural father to the care, custody, control, and companionship of his children has been recognized in several cases of this Court. *See, e.g., Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). This right includes within its scope the "loving protection" of the child. *Rivera v. Minnich*, 107 S.Ct. 3001, 3004 (1987). It is elementary that a "child" exists prenatally,[6] and that a father cannot enjoy the care, custody, control, and companionship of a dead, aborted child. This right is a "fundamental liberty interest," which may not be terminated absent clear and convincing evidence of parental unfitness. *Santosky v. Kramer*, 445 U.S.

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[6] *See, e.g., Black's Law Dictionary* (5th ed. 1979) ("Child . . . Unborn or recently born human being."); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

745, 753 (1982). "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Id.* The action of the Michigan Court of Appeals in ordering dissolved the trial court's injunction deprived the Father herein of this right to his unborn child absent any showing of his unfitness.

Third, the Father has a fundamental right and interest inherent in his status as a husband in the family unit. Even before privacy rights were recognized as attaching to individuals, they were found to be inherent in the family and marital relationships. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943). The "sacred" marital right of privacy is "older than the Bill of Rights." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1964). It is "fundamental" because it is rooted in the "traditions and [collective] conscience of our people." *Id.* at 493 (Goldberg, J., concurring)(quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). As a woman's fundamental abortion privacy right arises from this same constitutional locus it cannot be considered superior to that of her husband built on the identical foundation. Moreover, in the present case, where the Mother's interest does not even rise to the level of a fundamental privacy right, for failure to conform to the *Roe* paradigm requiring medical necessity, the Father's rights and interests must be superior.[7]

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[7] Even where some medical indication for an abortion exists, under the broad definition of maternal health adopted in *Doe v. Bolton*, 410 U.S. 179 (1973), thus, making the woman's interest rise to the level of a fundamental right, abortion jurisprudence does not preclude the consideration of the father's rights and interests in his child with those of the mother in aborting the child. *Roe* specifically postponed consideration of paternal interests, as they had not been raised in that case. 410 U.S. 165, n. 67. *Danforth* found unconstitutional a state statute requiring the consent (which could be denied for any or no reason or be unavailable merely because the spouse could not be located) of the spouse (whether or not he was, in fact, the biological father). 428 U.S. at 69, 71. Faced with a statute which permanently and absolutely struck the balance of rights of parents in favor of the husband in every case, this Court found it unconstitutional. *Id.* at 69. This Court was careful in responding to the dissent of Justice White, *id.* at 93, to clarify that it was not considering the constitutionality of a more nuanced approach. *Id.* at 70-71 n. 11. Thus, *Danforth* does not proscribe the consideration of a father's rights and interest, along with those of the mother, on a case by case basis, even where the mother's right may be characterized as fundamental.

2. THE STATE COURT'S PROTECTION OF THE FATHER'S FUNDAMENTAL RIGHTS AND INTERESTS WAS RATIONALLY RELATED TO A CONSTITUTIONALLY PERMISSIBLE PURPOSE.

The father has clear and profound interests in his children, which have been recognized by this Court as sufficiently weighty to qualify as fundamental rights. State protection of the rights and interests of its citizens is a constitutionally permissible purpose, indeed it is the very reason why courts exist.

An injunction, based on an individualized, judicial consideration of competing rights and interests, is rationally related to the state's constitutionally permissible purpose. The injunction herein precisely effectuated the purpose which the state sought to pursue. Thus, it was rationally related to the constitutionally permissible purpose and was not unconstitutionally infirm.

II. RECONSIDERATION OF THIS COURT'S DECISION IN *ROE v. WADE* IS APPROPRIATE, BECAUSE THIS COURT IS IN A BETTER POSITION TO CONSIDER THE ABORTION DILEMMA TODAY THAN IN 1973, AND BECAUSE THE BALANCING OF COMPETING INTERESTS REQUIRED IN THE CONTEXT OF THIS CASE IS MORE PROPERLY AND EFFECTIVELY THE SUBJECT OF STATE LEGISLATIVE ACTION.

If, indeed, the cases of this Court recognize the principle of abortion on demand, as sought in this case by the Mother, even where a woman's physician has expressly determined that the abortion sought is not medically necessary for her well-being, then *Roe* and its progeny should be reconsidered.

Recognition of abortion on demand was not the intent of the *Roe* majority, declared Chief Justice Burger in his dissent to *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2190 (1986). He maintained that

"every member of the *Roe* Court rejected the idea of abortion on demand." *Id.* Noting that *Thornburgh* "plainly undermine[d] that important principle," *id.* at 2190, he left the majority and voted with the dissent. He added:

> We have apparently already passed the point at which abortion is available merely on demand. If the statute [requiring informed consent procedures] at issue here is to be invalidated, the 'demand' will not even have to be the result of an informed choice.

Id. at 2191.

Chief Justice Burger concluded:

> The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*.

Id. at 2192.

To hold for the Mother on the facts of this case would be to recognize constitutional protection for abortion on demand. It would be to go beyond the holding of *Roe* itself. If the recent cases of this Court require such sanctioning of abortion on demand, then *Roe* should be reconsidered as having led to pernicious results.

The reconsideration of *Roe* is appropriate for two additional reasons: (1) the Court today is in a better position to evaluate the abortion dilemma than it was in 1973, and (2) the balancing of competitive interests required in this case is more properly and effectively the subject of state legislative action.

A. THIS COURT IS BETTER ABLE TO EVALUATE THE ABORTION DILEMMA TODAY THAN IT WAS IN 1973.

This Court is in a better position today than it was in 1973 to consider the abortion problem. This is so for several reasons.[8]

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[8] Professor Wardle has set these out in a more expanded form in Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U.L. Rev. 231, 236-45, which is followed in many details herein.

First, legal scholarship and caselaw have matured since 1973. The notion that a fundamental right of privacy included and protected a right to choose abortion was a novel idea when *Roe* was decided.[9] The idea that abortion laws might violate some constitutional principle had received little scholarly attention. One piece arguing such a view had been written in 1968,[10] but it was not even cited in *Roe*. Another article, written in 1971 by Means,[11] was the primary source of Justice Blackmun's historical and legal analysis. Such a paucity of legal scholarship was promptly remedied by the *Roe* decision itself, which unleashed thorough evaluation, debate, analysis, and criticism of the Court's constitutional analysis in *Roe*. Means' article was seriously challenged as to the validity of its history and analysis. *See* Destro, *Abortion and the Constitution: The*

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[9] *Id.* at 237.

> It should be remembered that prior to *Roe* abortion had been prohibited at common law, to a greater or lesser extent, for more than six centuries. 2. Bracton, *On the Laws and Customs of England* 341 (S. Thorne trans. 1968); 1 W. Blackstone, *Commentaries on the Laws of England* 129-30 (1783 & photo. reprint 1978). Those restrictions were a part of American common law when the Constitution was adopted. *See generally* J. Mohr, [*Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978)]; R. Perkins, *Cases and Materials on Criminal Law and Procedure* 25 (1969). During the 19th century common law abortion prohibitions were codified, many of them before or at the time the fourteenth amendment was adopted. *See Proposed Constitutional Amendments on Abortion: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94h Cong., 2d Sess. 5-30 (1976) (statement of Professor Joseph P. Witherspoon); J. Mohr, [*supra*], at 149-70. No substantial question about the constitutionality of abortion laws appears to have existed before 1968.

Id.

[10] Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev. 730 (1968).

[11] Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971).

Need For a Life Protective Amendment, 63 Calif. L. Rev. 1250, 1267-92 (1975); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 379-89 (1979); Horan & Balch, "*Roe v. Wade*: No Justification in History, Law, or Logic," Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," and Arbagi, "*Roe* and the Hippocratic Oath," in *Abortion and the Constitution: Reversing* Roe v. Wade *Through the Courts* (Horan, Grant & Cunningham eds. 1987). As of 1985, *Roe* had been the subject of more than two hundred law review articles. Wardle, *supra*, at 237 n.39. The flood of articles analyzing and rejecting or attempting to rewrite *Roe* continues to the present. Moreover, *Roe* and its analysis has become a standard topic of constitutional law treatises and has been covered in numerous books devoted to the subject. *Id.*

Roe also suffered in its analysis because of a paucity of case law, refining the analysis, in lower courts. *Roe* was able to cite seventeen cases, many dealing with collateral areas such as vagueness not the privacy doctrine itself. *Id.* Today there exists a substantial body of case law in the Supreme Court and well over two hundred and fifty abortion cases in lower federal courts. *Id.* at 238-39 n.41. Moreover, the small number of cases available at the time of the *Roe* opinion were not "a carefully ripened, balanced body of judicial doctrine in which the constitutional aspects of abortion had been carefully considered from different perspectives," but they were part of a "loosely coordinated 'flood of litigation'" initiated in 1968 and 1969 to bypass the process of legislative consideration. *Id.* at 239.

Second, related legal doctrines have been clarified since 1973, some of which "exacerbated the abortion dilemma" and "distorted the Court'd perception of the constitutional interests involved." *Id.* In 1973, the stigma of unwed motherhood was a powerful factor,[12] unlike today where national celebrities

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[12] *See generally* Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125, 1137-59 (1981). Discrimination in education and government benefits also existed. Wardle, *supra*, at 240; *Holt v. Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972) (re high school regulation barring unwed parents from extracurricular activities).

and common folk alike regularly resort to the practice. In 1973, illegitimacy led to legal inferiority.[13] Unwed fathers were expected to assume few responsibilites and had few rights.[14] Little legal recognition or provision was made for single parents.

The result of these "intolerant laws and customs" was a "cruel trap," often leading to recourse to abortion. Wardle, *supra*, at 240. The plight[15] of such women was placed center stage in the abortion debate and in the opinion of *Roe* itself. 410 U.S. at 153.

Today, however, the context is significantly different. The Court has, since 1971, considered the constitutionality of the laws creating such pressures. Wardle enumerates some of the changes since 1971:

> Women's rights and stature have generally been enhanced by the Court. Laws discriminating against pregnant women have been invalidated or amended. The Court has established that the Constitution does not shelter laws or government practices that discriminate against children born out of wedlock or their unmarried mothers. The Court has recognized the parental rights of unwed fathers

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[13] *See, e.g.*, H. Clark, *Law of Domestic Relations* 155-80 (1968); H. Krause, *Illegitimacy: Law and Social Policy* 21-42 (1971); Turton, *Unequal Protection of the Illegitimate Child*, 13 S. Tex. L.J. 126 (1971); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 337 (1962).

[14] *See* H. Clark, *Law of Domestic Relations* 176-77 (1968); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. Fam. L. 231 (1971).

[15] "Ironically, the Court itself was not and is not without some responsibility for perpetuating the harsh laws and customs that by 1973 were pushing growing numbers of desperate women into the tragedy of abortion." Wardle, *supra*, at 240 & n. 50 (citing *Labine v. Vincent*, 401 U.S. 532 (1971) which, less than two years before *Roe* upheld denying illegitimates the right to inherit, even where the deceased had acknowledged paternity, and *Reed v. Reed*, 404 U.S. 71 (1971), in which, finally in 1971, the Court recognized that a law discriminating against women violated their equal protection right.).

> and emphasized their familial and support duties. The Court has even facilitated access to contraceptives. Yet, ironically, while it has done much to abolish the stigma of birth out of wedlock, the Court has created a whole new class of illegitimates. The unborn are subject to the most invidious form of discrimination: denial of legal protection for their very lives. *Roe* set this new illegitimacy beyond the reach of legislative reform.

Wardle, *supra*, at 240-41 (citations omitted).

Third, the Court is also in a better position today to consider the abortion dilemma because of more advanced scientific knowledge about unborn life and a clear view of the legal and societal implications of recognizing an abortion privacy right. *See generally* Wardle, *supra*, at 241-44 & nn.57-63. Reproductive technology has expanded dramatically, the unborn are now medically treated as patients, their humanity and responsiveness to painful stimuli has become common knowledge. Such knowledge was not widespread in 1973. *Id.*

Moreover, the past fifteen years of experience with a broad abortion right have damaged society. There has been an avalanche of abortions, well over twenty million since 1973 in the United States alone. After the Court placed its perceived imprimatur on abortion, it came to be treated by many women, not as a "profound, troubling, and sensitive dilemma" but as "an ordinary matter 'much like elective cosmetic surgery.'" *Id.* at 242 (quoting R. Benson, *Current Obstetric & Gynecological Diagnosis & Treatment* 550 (5th ed. 1984)). Fundamental values of our civilization and democratic system have been neglected, such as the prevention of violence and protecting the weak, vulnerable members of our society. Abortion certainly entails violence against innocent human life. "Are there no risks to a democratic society posed by the raising of a generation that has accepted the practice of killing defenseless victims to avoid personal inconvenience?" *Id.* at 260. Troubling effects of *Roe* have been widely perceived in such areas as prenatal fetal experimentation, treatment of premature and handicapped newborns, active euthanasia and infanticide, and a

growing epidemic of postnatal child abuse. *See id.* at 242-43, and sources cited therein.

Fourth, it can now be seen, as it could not be in 1973, that segments of the medical profession have been engaged in exploitive practices, offering little or no counseling in clinics that depend on a steady stream of abortions for their livelihood, operating in assembly-line fashion, and remaining oblivious to the very real pressures often placed on teens to have abortions — a radically different picture, from that painted in *Roe* of the patient, objective, disinterested family doctor looking out for the best interests of his patient and carefully explaining all the facts, options, and risks. *See generally id.* at 244-45 and sources cited therein.

In sum, so much of relevance to judicial consideration of the abortion dilemma has changed in the past fifteen years that this Court is in a far superior position to consider that dilemma than was the *Roe* Court of 1973. Given the pernicious results of *Roe* and the unparalleled scholarly outcry against the work of this Court in *Roe*[16] a reconsideration of *Roe* employing the improved illumination cast on the subject is appropriate.

B. THE BALANCING OF COMPETING INTERESTS REQUIRED IN THE CONTEXT OF THIS CASE IS MORE PROPERLY AND EFFECTIVELY THE SUBJECT OF STATE LEGISLATIVE ACTION.

Roe v. Wade has been criticized by Archibald Cox as "read[ing] like a set of hospital rules and regulations, whose validity is good enough this week but will be destroyed with new statistics." A. Cox, *The Role of the Supreme Court in America* 113-14 (1976). This has proven to be the case. The trimester scheme set out with bright lines in *Roe*, 410 U.S. at 162-66, became blurred in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1976). Justice O'Connor noted the failure of the Court to apply "neutral principles" and

[16] Some of these results and criticisms are given in the petition by the Guardian Ad Litem herein. *See* Petition of Guardian Ad Litem at 19-26.

its reliance on an analytical framework that "varies according to the 'stages' of pregnancy" and "the level of medical technology available when a particular challenge to state regulation occurs." *Id.* at 452 (O'Connor, J., dissenting). She observed that the lines had become "blurred" and that "[t]he *Roe* framework . . . [was] clearly on a collision course with itself." *Id.* at 455, 458.

Justice O'Connor commented on the basicly legislative work of the Court in its abortion jurisprudence:

> It is . . . difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.

Id. at 456.

The result of the *Roe* Court's venture into legislation has been the necessity of revising *Roe*'s legislative prescription to keep pace with changing circumstances. Thus, we find this Court attempting to do the work for which legislatures are equipped and designated in our Republic, rather than engaging in the comparatively timeless considerations of constitutional principle based upon neutral principles in which the Court normally and more properly engages.

The spectacle of the Supreme Court of the United States poring over the latest medical pronouncements to determine whether abortions may be performed in clinics this year instead of hospitals, as last year, *cf. Roe*, 410 U.S. 163-64 ("Examples of permissible state regulation [include] the facility in which the procedure is to be performed, that is whether it must be a hospital . . . ."), *with Gary-Northwest Indiana Women's Services v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980)("the express language of *Roe* mandates that Indiana's second trimester hospitalization requirement be found . . .

constitutional"), *summarily aff'd sub nom. Gary-Northwest Indiana Women's Services v. Orr*, 451 U.S. 934 (1982), *and Akron*, 462 U.S. at 435-37 (ruling unconstitutional a hospitalization requirement), is disconcerting, at least. So is the decision to move the end of the first trimester from about twelve weeks of gestation, as in *Roe*, to sixteen weeks, *Akron*, 462 U.S. at 436, or, maybe, eighteen weeks, *id.* at 437, — it becomes difficult to keep track of the Constitution in its constant perambulations.

In the separation of powers established in our federal Constitution, it is not clear that it is the task of this Court to act as a super medical board for the country. That sort of task, where regulation of the medical matters is required, has been given to the legislature. Increasingly fine hair-splitting, as required in abortion jurisprudence, does not become the judiciary.

The result of the current approach is that the lower federal appellate courts courts are now wrestling with petty issues such as whether a forty-eight hour waiting period for minors seeking abortion is constitutional (upheld in *Hodgson v. Minnesota*, No. 86-5423, slip op. (8th Cir. Aug. 8, 1988)(en banc)) or whether it should be twenty-four hours (struck down in *Akron Center for Reproductive Health v. Slaby*, No. 86-3664, slip op. (6th Cir. Aug. 12, 1988)), or no hours. Seven cases to date have engaged this Court in attempting to fine-tune the permissible regulation of minors seeking to abort. *Danforth*, 428 U.S. 52; *Bellotti v. Baird (I)*, 428 U.S. 132 (1976); *Bellotti v. Baird (II)*, 443 U.S. 622 (1979); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Akron*, 462 U.S. 416; *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 4766 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169. No respite appears likely in the near future from the required judicial pursuit of hair-splitting.

It is for this reason that legislatures have historically been expected to attend to this sort of matter. They are not bound by "case or controversy" requirements or rules of evidence and procedure. They may hold hearings, appoint advisory panels,

employ researchers, experiment, and revise their views without concerns of stare decisis.

John Hart Ely wrote shortly after *Roe* was decided: "[P]recisely because the claims involved are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them — certainly under the guise of enforcing the Constitution." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935 n.89 (1973). Justice Frankfurter, some four decades before *Roe*, criticized:

> the imposition by judges of their private notions of social policy [on the states] because it so often turns on the fortuitous circumstances which determine a majority decision and shelters the fallible judgment of individual Justices, in matter of fact and opinion not peculiarly within the special competence of judges, behind the impersonal dooms of the Constitution.

F. Frankfurter, *The Public and Its Government* 49-51 (1930).

In the instant case, a balance must be struck between the interests of a woman demanding an abortion, even though her physician has determined that one is not necessary for her well-being, and the interests of her husband, desiring that his interests, along with the life of his child, not be sacrificed to less weighty interests. Likewise, the Guardian Ad Litem requests a balancing of interests relating to the unborn child. This sort of balancing, in an area of great public concern subject to expected and common changes of circumstances, has historically been entrusted to the legislature, where the ability of legislation to be amended by subsequent legislation and to be interpreted by the courts offers marked advantages over nearly inalterable constitutional law.

Roe should be reconsidered in light of these advantages of the legislative approach over the constitutional law approach to the major problems of the day, in light of this Court's better position to do so now, and in light of the unforeseen pernicious effects which flow from *Roe*, especially should this Court find that abortion law now countenances abortion on demand.

CONCLUSION

WHEREFORE, petitioner Carlton James Lewis respectfully prays this Court to issue a writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

Thomas J. Balch
Counsel of Record
Steven W. Moss
Counsel for Petitioner

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(313) 230-0080

Appendix

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Order

Entered: September 22, 1988

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice
[list of justices omitted]

84149

SHAWN KATHLEEN LEWIS,

Plaintiff-Appellee,

v

SC: 841469
COA: 111440
LC: 88-159036-DM

CARLTON JAMES LEWIS,

Defendant-Appellant,

and

GENE MEYERS,

Guardian *ad litem* — Appellant.

Pursuant to this Court's order of September 15, 1988, the parties have filed additional pleadings in order to assist us in deciding whether to grant leave to appeal. We have considered those pleadings and the original application and motions, the Court of Appeals order dated September 15, 1988, and the orders of the trial court.

On order of the Court, the motions for immediate consideration are considered, and they are GRANTED. The applications for leave to appeal are also considered, and they are DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

The motions for stay are also considered. The stay provided for in this Court's order of September 15, 1988, is EXTENDED until 5:00 p.m. Monday, September 26, 1988. In all other respects, the motions for stay are DENIED.

The motion for special admission of foreign counsel is also considered, and it is GRANTED.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 22, 1988 /s/ _____

Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

Donald E. Holbrook, Jr.
Presiding Judge

William R. Beasley
Elizabeth A. Weaver*
Judges

SHAWN K. LEWIS v CARLTON J. LEWIS

Docket
111440

L.C. # 88 159036 DM

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders pursuant to MCR 7.205(D)(2) that the lower court's injunction is DISSOLVED, because the injunction interferes with plaintiff's constitutional rights as set forth by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 438 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788 (1976).

The motion to appear and practice is GRANTED.

The motion for immediate consideration of the motion for stay is GRANTED.

The motion to stay the effect of this order is GRANTED and this order is STAYED until 5:00 p.m. Monday, September 19, 1988. No additional bond is required.

This Court retains no further jurisdiction.

*Judge Weaver concurs and states:

The law of the United States Constitution as announced by the United States Supreme Court is binding on trial courts and on appellate courts. That law can be changed in only two ways:

1. The United States Supreme Court can change its opinion;

2. Three-fourths of the state legislatures or state conventions called for said purpose can ratify an amendment to the United States Constitution proposed by two-thirds of both Houses of the United States Congress or proposed by a constitutional convention applied for by two-thirds of the state legislatures. (See U.S. Const. art. V).

The law of the United States Constitution as declared by the United States Supreme Court is clear in this matter. The United States Supreme Court wrote in *Roe v. Wade*, 410 U.S. 113, 163; 93 S.Ct. 705; 35 L.Ed.2d 147, 182 (1973):

> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, 35 L.Ed.2d 174, 175, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .
>
> "*This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine,* ***without regulation by the State,*** *that, in his medical judgment,*[1] *the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effecuated by an abortion* ***free of interference by the State.***

---

[1] In *Roe v. Wade*, *supra*, at 35 L.Ed.2d 177, the United States Supreme Court listed factors involved in the physician's "medical judgment." The Court wrote:

> "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment

(Footnote continued)

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb . . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." (emphasis added)

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52; 96 S.Ct. 2831; 49 L.Ed.2d 788, 803 (1976), after noting that *Roe v. Wade* clearly established that "the State may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy," the Supreme Court held that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." *Id.* at 805. The Supreme Court said that "the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.'" (citation omitted).

The trial court concedes at page 11 of its opinion that its injunction does constitute state action. That state action violates the law announced in *Roe v. Wade*, *supra*, and *Planned Parenthood of Central Missouri v. Danforth*, *supra*.

Footnote 1 continued

> that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it . . . . [T]he additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation."

Although the issue of abortion raises important moral questions, such questions are not applicable to the decision here. Judges are sworn to uphold the Constitution and laws of the United States. They must apply the law of the United States Constitution as announced by the United States Supreme Court.

For the preservation of a society of laws, not of men, trial courts or appellate courts have no authority to change the law of the United States Constitution as announced by the United States Supreme Court.

SEAL

A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on September 15, 1988

/s/ _____

Ronald L. Dzierbicki
Chief Clerk

A TRUE COPY
John H. Trecha, Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

SHAWN KATHLEEN LEWIS,

Plaintiff,

vs.

CARLTON JAMES LEWIS,

Defendant.

File No. 88-159036-DM

Judge V. Washington

STIPULATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Arthur C. Swirtz
Attorney for Plaintiff

Steven Moss
Attorney for Defendant

Linda Pylypiw
Shelly Spivack
Attorneys for ACLU

STATEMENT OF FACTS

See Stipulated Facts

Preliminary Statement

A document was presented to the Court at 5:00 p.m. on August 9, 1988 under the format of the spouse abuse injunction set forth in Michigan Compiled Laws 600.2950 and 552.14.

Time being of the essence in terms of the scheduled abortion, the Court signed the injunction in the obvious wrong form to prevent the abortion the following day. Apparently the injunction was served on a number of individuals and the abortion did not occur.

On or about August 17 the Court was contacted by Linda Pylypiw indicating that she was about to enter an Appearance

on behalf of Mrs. Lewis on the issue of the abortion and that she would be working with the American Civil Liberties Union and Attorney Shelly Spivack. A discussion was held in chambers with Attorney Pylypiw and Attorney Moss and it was determined by representations of Attorney Pylypiw that the first pregnancy for Mrs. Lewis had been very difficult and she had been advised medically not to have any more pregnancies. The Court advised Ms. Pylypiw that if this in fact was supported by medical documentation that the restraining order or the injunction would be dissolved on Friday, the 19th before the Court left for an anticipated ten (10) day vacation.

On Friday, the 19th, at approximately 3:00 p.m. Attorney Moss was present in the Court chambers and Ms. Pylypiw was on the speaker phone and it was determined that in fact there was no such medical documentation and the doctor in fact said that it was specifically a social decision as opposed to a medical decision to terminate the pregnancy.

At that time the Court offered Ms. Pylypiw a hearing relative to the issues of whether or not the preliminary injunction/temporary restraining order ought to be dissolved and it was decided that the anticipated return date of the Court of September 6 would be in plenty of time in terms of her client's physical condition to have a decision of the Court on the issue of dissolving the injunction. That being so the Court had no further contact with the case until September 6 when the parties convened at 3:30 p.m. for purposes of a decision. In the interim Briefs were filed on behalf of the Plaintiff and the Defendant as well as a Reply Brief by the Plaintiff. There are some unresolved questions as it relates to the conduct of the parties in this case. In particular they are as follows:

1. How was it that Mr. Lewis found out about Mrs. Lewis being pregnant?

2. Why did Mrs. Lewis share that information with anyone other than her physician when she realized that in fact she was pregnant?

3. Why didn't Mrs. Lewis simply have an abortion rather than talking it over with her husband?

4. Why didn't her attorney of record advise Mrs. Lewis that she could avoid the Court's jurisdiction by voluntarily dismissing her divorce action?

5. Why did Mr. Lewis seek to intervene and prevent Mrs. Lewis from having an abortion — what was his underlying motivation — is this a means of leveraging against the divorce, is this a tactic to prevent her from having the divorce which he obviously does not want.

6. How is that both the parties were able to reconcile periodically without filing a notice a [sic] reconciliation with the Court as provided by 3204(C)?

This failure to inform the Court of the reconciliation is not dispositive of the jurisdictional issue but is certainly something that a higher court may review if it wants and it is merely being pointed out to show that this Court recognizes that there may be jurisdictional ups and downs in this case.

As to the form of the Order that was originally entered it should be redrafted to comply with MCR 3.203 and 3.310 and in particular it should give notice that a hearing will be held relative to whether or not that Temporary Restraining Order should become a Preliminary Injunction on September 6, 1988 @ 3:30 p.m. In particular 3.310(c).

There was a stipulation as to the Statement of Facts set forth above so as to obviate the need for an evidentiary hearing relative to the Court's obligation to make findings of fact.

THE ISSUE PRESENTED

DOES THE STATE CIRCUIT COURT HAVE JURISDICTION AND AUTHORITY TO ENTER AN INJUNCTION PROHIBITING THE FEMALE PARTY IN A PENDING DIVORCE ACTION FROM HAVING AN ABORTION OF A CHILD CONCEIVED BETWEEN THE PARTIES DURING THE PENDENCY OF THE DIVORCE ACTION?

DISCUSSION

The Court's jurisdiction in divorce matters is by function of Statute and our actions are interpreted and directed by Com-

mon Law and Michigan Court Rules. We as trial Court's are not free to allow our personal views to interview [sic] with that which we must do according to the divorce practice within the State of Michigan. That being so, I at this point reference the pertinent divorce statutes and they are MCLA 552.6 where it sets forth the "no-fault" language which must be contained in the Complaint for Divorce and that is specifically that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. It is interesting to note that that same statute in section 1 prohibits the Plaintiff from making any further explanation for the grounds for divorce. At the same time it is set forth in the Michigan Rules of Court under Rule 3.204(a) that the following material must be contained in the Complaint for Divorce:

1. The complete names of the parties and their names before the marriage;

2. The complete names and the dates of birth of any minor children of the parties or children born during the marriage;

3. That their are no minor children of the parties or minor children born during the marriage, if there are none;

4. That the female party is pregnant, if she is;

5. The grounds for divorce or separate maintenance in the statutory language without further particulars;

6. The statutory residence requirements; and

7. Whether there is property to be divided.

It is also interesting to note that as it relates to divorce practice under the instructions that this Court was given at the new Judge's seminar between January 5 and 9, 1987, by the Michigan Judicial Institute that in a specific outline handed out

it was set forth that the proof requirements once the divorce got to Judgment stage should include the following:

1. Jurisdiction;
2. Validity of marriage;
3. Statutory grounds;
4. Whether female is pregnant.

At a special problems outline, page 11.

The divorce statute also goes onto [sic] to speak as to the power of the Court specifically at MCLA 552.12 when it says:

> Suits to annul or affirm a marriage, or for a divorce, should be conducted in the same manner as other suits and courts of equity; and the Court shall have the power to award issues, to degree [sic] costs, and to enforce its decrees, as in other cases.

The divorce statute further continues with the responsibilities of the Court as it relates to the care, custody and support of minor children during the pendency of the action when it states at section MCLA 552.15:

> After the filing of a complaint in an action to annul a marriage or for a divorce or separate maintenance, on the motion of either party or the Friend of the Court, **or on the Court's own motion,** the Court may enter such orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action as the Court considers proper and necessary . . .

Further, the divorce statutes specifically speaks to the Court's requirement upon the entry of Judgment as relates to minor children and it says specifically at MCLA 552.16:

> Upon annuling [sic] a marriage or entering a Judgment of Divorce or Separate Maintenance, the Court may enter such orders as it considers just and proper concerning the care, custody, and support of the minor children of the parties . . .

It appeared that at one point there was a section specifically giving the types of evidence necessary for the taking of a divorce decree and those sections were MCLA 552.40 to 552.42. These were repealed by Public Act of 1961 No. 75, Section 2 effective January 1, 1972.

It is also a requirement that when the issue of custody is raised in any divorce action that the Child Custody Act of 1970 comes into play and that is found at MCLA 722.21. Of particular note is the section that defines "child" under that act, is [sic] as follows. That is found at MCLA 722.22(2)(a): "Child" means minor child and children.

The statute then goes on to define the best interests of the child being the sum total of a group of factors which must be evaluated and determined by the Court and they are found specifically at MCLA 722.23.

The Child Custody Act also requires that the Court make certain determinations as it relates to the rights of the children and that is found specifically at MCLA 722.24 wherein the statute says:

> In all actions now pending or hereafter filed in a Circuit Court involving dispute of custody of a minor child the Court shall declare the inherit [sic] rights of a child and establish the rights and duties as to custody, support, and visitation of a child in accordance with this Act.

The Child Custody Act further requires that the Court give liberal construction to the application of the Act specifically at MCLA 722.26 it says:

> The provisions of this Act being equitable in nature shall be liberally construed and apply [sic] to establish promptly the rights of the child and the rights and duties of the parties involved. This Act shall apply to all Circuit Court child custody disputes and actions whether original or incidental to other actions . . .

Along the same line as it relates to whether the Courts in Michigan and the legislature have looked to the issue of defin-

ing when a fetus becomes a person or a child or whether that child in utero has certain rights has been addressed by the Michigan Supreme Court in the case of *Tyler v. Tyler*, 348 Mich. 169 (1957). The issue in the *Tyler* case was whether or not the Plaintiff, a service man on leave who filed for divorce from his wife, and then withheld the fact that she was pregnant from the Court during the taking of the proofs and then departed for overseas duty could have the Judgment set aside with a provision made for a child who was in fact conceived during that leave. The trial Court made a finding that a man could not come in and submit himself to the Court's jurisdiction and then withhold the fact that the wife was pregnant from the Court and then object to the re-opening of the divorce decree. Specifically, the issue in the *Tyler* case was whether or not the decree could be set aside for the child that was not yet born. The issue was handled by the Court when it stated at page 172:

> We find it unnecessary to consider the various legal points Plaintiff has posed in his Brief. **This is a case where the Court below was under continuing duty to provide for the rights as well as the maintenance of the expected child.** Having been promptly apprised of an urgent fact not theretofore made known to him, that an only child of parties was due for birth without provision for such child having been made in the decree — the chancellor was duly empowered by the motion as filed and served on counsel of record to vacate the decree and its supporting order pro confesso. **Indeed, if he had been so minded, the chancellor for an abundant reason could have ordered a rehearing on his own motion.** *Tyler v. Tyler*, 348 Mich. 169 at 172. Emphasis supplied, citation omitted.

There is further finding in the Statutes of Michigan that an unborn person is to be given certain rights specifically in the Revised Judicature Act found at MCLA 600.2045 Section 1:

> If in an action or proceeding, other than one in Probate Court, it appears that a person not in being may become entitled to a property interest, real or personal, legal or equitable, involved in or affected by the action or proceeding, and the interests of the unborn person is not or cannot

> otherwise properly be represented and protected, the Court, **upon its own motion,** or upon the motion of any party, may appoint a suitable person to appear and act of [sic] Guardian Ad Litem of the unborn person. The Guardian Ad Litem is authorized to engage counsel and do whatever is necessary to defend and protect the interests of the unborn person. A Judgment or order made after the appointment shall be conclusive upon the unborn person for whom a Guardian was appointed.

I have taken the time to enumerate the standards set forth under divorce proceedings because I think it is very important in a case that deals with the highly emotional issue of abortion to set the parameters so that people know exactly what is being ordered, and what is not being ordered.

The Plaintiff in this case is raising several issues in her Brief. She states that she one was served with an imperfect order. That has [sic] conceded and will be corrected in short order. However, the substantive arguments are that there is no right on behalf of the State to interfere in the decision to terminate a pregnancy during the first trimester. She relies heavily on *Roe v. Wade*, 410 U.S. 113; 93 S.Ct. 705; 35 L.Ed 2d 147 (1973), which according to Plaintiff held that a woman's decision whether or not to terminate her pregnancy is protected by the right of privacy founded in the 14th Amendment of the United States Constitution and no State may interfere in that decision. That interpretation is an overly broad reading of what was found in *Roe v. Wade*. I went through and re-read that case several times and its holding specifically states that a State may not set forth criminal abortion statutes that are overly broad in nature, that is not making a distinction between the first trimester and second and third trimesters of a woman's pregnancy and it speaks specifically to State regulation by way of statute. The only issue or the only section of the holding which may give some basis to Plaintiff's position is that set forth at Subsection A which states:

> For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must

be left to the medical judgment of the pregnant woman's attending physician.

That section of the holding if taken out of context would appear to abrogate the finding in *Tyler v. Tyler, supra*, and the provisions of MCLA 600.2045 as well as the inferential responsibilities placed in the trial Court by the Child Custody Act of 1970 and the divorce statutes, and Michigan Court Rule 3.204.

However, if that Subsection is read in the total context of the decision it is clear that the high Court was speaking of statutory regulation and not merely State action. A position that Plaintiff makes in her Brief at page 10 is that the State Court injunction does constitute State action, that is not disputed by this trial Court. This trial Court's position is that it is caught in a quandry between the United States Supreme Court, and its decision in *Roe v. Wade* whether or not it applies to actions by the judiciary since that was not specifically addressed, the findings in *Tyler v. Tyler* that the Court was under a continuing duty to make provisions for the expectant child; indeed in the *Tyler* case in the research headnote which is not cited for authorative purposes but merely for research availability including shepardizing, it is interesting to note that the holding is set forth as earlier recited, but there is also a reference to Court Rule No. 28 Section 4 (1945) which would indicate again an existing Supreme Court Court [sic] Rule governing the issue of unborn children.

The issue of whether or not *Roe v. Wade* specifically overruled the holding in *Tyler v. Tyler* was addressed at least in this Court's mind by the Shepardizing of the *Tyler* decision. Obviously, *Tyler* was an earlier decision than *Roe v. Wade* and if in fact it was overruled by that narrow Subsection A of the Supreme Court's holding then indeed that would have been set forth in the *Shephard's* citations. That is not found by this Court on its review of the citations. Thus, the most logical conclusion is that the United States Supreme Court was addressing the issue of the State regulation in the form of Statute and not addressing the issue as it related to a Common Law decision.

The Defendant makes an interesting observation in terms of how a child is defined, however, as we see in the Child Custody Act, a child has a very broad definition. If we take the ordinary meaning as found in Webster's Third New International Dictionary Unabridged 1961 Edition, adopted from page 9 of Defendant's Brief, we note that unborn or recently born human beings are defined as "children". This was apparently reaffirmed in Webster's Ninth New Collegiate Dictionary of 1974, "an unborn or recently born person". Apparently this was further adopted in Black's Law Dictionary Fifth Edition 1979 which defines child as an unborn or recently born human being.

It is clear to this Court that there has to be some sort of willingness by the highest Court in the State of Michigan and perhaps the United States Supreme Court to address the issue of divorce law and the responsibility of the Court verses [sic] the private rights of the individuals. In this Court's view this is not a case of mother's right to terminate pregnancy verses [sic] father's rights to veto pregnancy, thus I have not addressed the issues set forth in the *Planned Parenthood v. Danforth* case (citation omitted).[1] I don't think that is the issue here. As I look at the issue the parties in this case submitted themselves to the jurisdiction of the Court under the cloak of the Divorce Statute, Common Law, and Michigan Court Rules. Once that occurred an additional responsibility was placed on the Court to look into the interests of any minor children that the parties may have. Clearly, the parties did not at the time of filing have more than one minor child. As this Court is able to research it, on short notice, it appears that there is a wide open view as to what constitutes a child. Under present Michigan Law, statutory, case law, and Court rule. [sic] Why would the Michigan Court Rules, as set down by the Michigan Supreme Court make counsel place in the Complaint whether or not the female is

[1] Nor the other issues raised by Plaintiff in her Brief as I do not feel they need to be addressed within the narrow context of this Court's Opinion, as to the issue presented for analysis.

pregnant? Why, if there is to be no intervention would the Judicial Institute tell new Judges as of 1987 that they must have proof that the female is not pregnant? These questions are not answered directly. They need to be!

People should know specifically how the legislature is defining a minor child. Conversely, they need to know why and whether or not there will be intervention on behalf of the Court if a child is conceived during the course of a marriage. This is not the case where the parties were estranged and there was a conception by someone other than the parties. This is a case that falls, in this Court's view squarely within the jurisdiction of divorce proceedings, and this Court is going to preserve the status quo until it is given direction from a higher court, preferably the Michigan Supreme Court as it is their Court Rule that inferentially gives the trial Court the responsibility to look after the interests of an unborn child, and their earlier *Tyler* decision that says there is a continuing duty as it relates to the rights and maintenance of an expected child, but gives no definition of that duty.

I am not getting into the issue of how other areas of Michigan Law treat the fetus. Although I do note for the record that it appears that there is some consideration of what happens to a child in utero as was decided *in the Matter of Baby X* [,] 97 Mich. Appeals 111 (1980), and in the tort area as set forth in *Womack v. Buchhorn*, 384 Mich. 718 (1971), and *O'Neal* [sic] *v. Morris*, 385 Mich. 130 (1971), and it appears that at least that at one point one of the Supreme Court Justices was of the opinion that there needs to be a judicial determination of personhood of the unborn. See *Kilpatrick v. St. Joseph Hospital*, (Docket #61528). That would have been specifically Justice Ryan in a dissenting Opinion on that application found at 409 Mich. 868, wherein he says:

> Judicial determination of the personhood of the unborn is a vitally important question of highest juris prudential [sic] significance. The law on this question is unclear and apparently contradictory. See *Tunnicliffe v. Bay City's*

Consolidated Rail Co. 102 Mich. 624; 61 N.W. 11 (1894); *O'Neal* [sic] *v. Morris*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Toft* [sic] *v. Goree*, 65 Mich. Appeals 296; 237 N.W.2d 297 (1975); *Roe v. Wade*, 410 U.S. 113; 93 Sup. Ct. 705; 35 L.Ed.2d 147 (1973).

In that case the issue was whether or not a thirteen week old fetus was a person. If so, then he felt that further oral argument and briefing were indicated. Because the question was whether or not the mother and father in a common law negligence action could claim damages for the loss of society and companionship of a thirteen week old fetus which was aborted due to alleged negligently [sic] injury inflicted by the Defendant upon Plaintiff mother and proximately causing the abortion.

CONCLUSION

As all can see this is not a case where we have simply two people who happen to create a fetus. What we have are two people who have come under the jurisdiction of the Divorce Statutes, Case Law, and Court Rules. Because of that, they are in a unique position as it relates to the issue of terminating a pregnancy. As this Court reads the various cases, and statutes, and Court Rules, the inference is quite clear, if not the absolute direction, and that is, if there is a child conceived during the term of the marriage while the divorce is pending that divorce cannot be concluded until provisions are made for that child. Specifically, when you look at the Revised Judicature Act, MCL 600.2045, the issue becomes whether or not that child once conceived then is entitled to birth without outside interference.

That question is not one which apparently has been posed or answered in any case that this Court is able to research and uncover. Because of that, I am not dissolving the Temporary Restraining Order of 8/9/88. I am making it a Preliminary Injunction from this point forward directing that the form of the original Injunction be modified to resemble that of a Tempo-

rary Restraining Order Nun [sic] Pro Tunc to August 9, 1988, and will gladly certified [sic] this issue to the higher Appellate Courts, at the parties [sic] pleasure to the Court of Appeals, more appropriately to the Michigan Supreme Court.

Further, I hereby appointed Attorney Gene Myers as Guardian Ad Litem for this child during the pendency of this matter.

IT IS SO ORDERED, AND THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL THERE BEING NO JUST CAUSE FOR DELAY.

/s/ _____
Valdemar L. Washington
Circuit Court Judge

Dated: September 6, 1988

VALLEY MEDICAL CENTER
John L. Stoker, D.O.
5142 Miller Rd.
Flint, Mi. 48507

NAME: Cari Rund

DATE: 8-18-87

Totally Incapacitated: _____

Partially Incapacitated: X

From _____ Thru _____

It is in general
agreement with a medical
decision for a trip
with this patient.

SIGNED: John L Stoker DO

JOHN L. STOKER, D.O.